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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 231

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION, ex rel.,
MOULDING-BROWNELL CORPORATION, et al.,
Appellees.

BRIEF FOR APPELLEES

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INDEX

	PAGE
Statement	1
Statement of the Case	2
Order of the Illinois Commerce Commission	5
Decision of the Supreme Court of Illinois	6
Summary of Argument	8
The Motion to Dismiss or Affirm	11
The Track Involved Is a Part of Appellant's Railroad System and Is Open for the Use of the Public	14
Under Illinois Law Appellant is Obligated to Maintain, Keep in Repair and Operate the Track	18
The Order of the Commission Does Not Violate the Fourteenth Amendment to the United States Constitution	21
Conclusion	30
Appendix	31

Cases Cited.

American Ry. Express Co. v. Kentucky, 273 U. S. 269	19
Ark. So. Rd. v. German Bank, 207 U. S. 270	20
Atl. Coast Line Rd. Co. v. N. Car. Corp. Comm., 206 U. S. 1	24
Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155	14
Chicago & N. W. Ry. Co. v. Ochs, 249 U. S. 416	26
Detroit & Mackinac Ry. v. Paper Co., 248 U. S. 30	19
Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157	15

PAGE

Fort Smith Light & Trac. Co. v. Bourland, 267 U. S. 330 22
German-American Bank of Seattle v. Normile, 82 Wash. 368; 144 Pac. 289..... 28
Gridley v. City of Bloomington, 68 Ill. 47..... 28
Lake Erie & West. Rd. Co. v. State P. U. Com. of Ill., 249 U. S. 422.....11, 15
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61.. 15
Milheim v. Moffat Tunnel Dist., 262 U. S. 710..... 12
People v. Blocki, 203 Ill. 363..... 14
Price v. Illinois, 238 U. S. 446..... 15
Public Utilities Comm. v. Smith, 298 Ill. 151..... 14
Quong Ham Wah Co. v. Industrial Comm., 255 U. S. 445 15
Sunasack v. Morey, 196 Ill. 569..... 28
Swiss Oil Corporation v. Shank, 273 U. S. 407..... 15
Truesdale v. Peoria Grape Sugar Co., 101 Ill. 561.... 14
Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211 16
Van Oven v. Chi. B. & Q. R. R. Co., 317 Ill. 334.... 14
Waters-Pierce Oil Co. v. Texas (No .1), 212 U. S. 86 20
Western & Atlantic R. R. Co. v. Georgia Pu. Serv. Com., 267 U. S. 493..... 23
Williamson v. Phillipoff, 66 Fla. 549; 60 So. 269..... 28

STATUTES CITED.

Illinois Revised Statutes, 1937, Ch. 111 2/3, Sec. 49a.. 22
Illinois Revised Statutes 1937, Ch. 111 2/3, Sec. 69.. 2
28 U. S. C. A., Sec. 344..... 11

TEXTS.

51 Corpus Juris, 760..... 28

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Appellees.

BRIEF FOR APPELLEES

MAY IT PLEASE THE COURT:

Having succeeded in bringing this case to the attention of this Court by appeal from the Supreme Court of Illinois on the assertion that a substantial federal question is involved, the appellant has filed a 60-page brief and argument principally challenging the correctness of the decision of the Supreme Court of Illinois on non-federal grounds—in particular that the Supreme Court of Illinois has misconstrued certain statutes of the State of Illinois, has misstated the common law, and has misapplied both the common and statutory law of Illinois in reaching its decision in this case.

Statement of the Case.

Under the laws of Illinois, the Illinois Commerce Commission is required to make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. (Ill. Rev. Stat. 1937, ch. 111-2/3, sec. 69; Appendix, p. 33.) In compliance therewith, in this case the Commission made findings of fact which appear on pages 24 to 33, both inclusive, of the printed transcript of record. The correctness of those findings of fact has never been challenged by the appellant. We, therefore, refer the Court to those findings of fact instead of burdening this brief with a repetition thereof.

However, the following short summary of the essential facts and of the proceedings before the Illinois Commerce Commission may aid the Court in passing upon the issues before it.

Sometime prior to 1884—more than fifty years ago—the track in question was constructed by or at the cost and expense of owners of lands on which the track is laid, and was connected with the main track of the railroad now owned by appellant. (R. 25.) As originally constructed it crossed five streets at grade. (R. 25.) In 1903 the City Council of the City of Chicago passed an ordinance requiring one of appellant's predecessors to elevate that portion of the track which crossed three of those streets, whereby a grade separation between the streets and the track would be provided. (R. 25-26.) The ordinance was for a term of twenty years and imposed a charge of $300 per annum for the privilege of maintaining the track across streets. (R. 26.) The cost and expense of elevation was borne by The Peoples Gas Light and Coke Company, one of the industries served over the track, and

the Commonwealth Electric Company, one of the owners of land on which the track was laid, pursuant to a contract, dated November 1, 1904, between those companies and one of appellant's predecessors. (R. 26-27.) By that contract, the Gas Company and the Electric Company agreed to pay the entire cost of elevating the track and assumed the payment to the City of the annual compensation of $300 imposed by the ordinance, and the railway company agreed to maintain, renew, replace and repair the track during a period of five years and so long thereafter as the railway company should be permitted to use and operate the track for the purpose of handling freight business of the Gas Company and the Electric Company and of such other industries as may be located upon any lot or lots abutting upon the track, to the exclusion of all other railroad companies. (R. 26-27.)

During the life of that ordinance the Gas Company reimbursed the railway company for the annual payments made by the railway company to the City of Chicago as compensation for crossing public streets. (R. 27.)

Upon the expiration of the 1903 ordinance, the City Council of the City of Chicago, on December 10, 1924, passed a new ordinance purporting to grant permission to the railway company to maintain and use the spur track, as then constructed, over and across the five streets hereinabove mentioned for a period of twenty years, and imposing an annual charge of $1,400 for the supposed privilege of crossing those streets and alleys. (R. 27-28.) Later, by ordinance passed in 1934, the annual charge was reduced to $700 per annum. (R. 28.)

The Gas Company refused to pay the annual charge of $1,400 imposed by the 1924 ordinance, (R. 9-10), on the obvious ground that it should not be required to pay that charge when the railroad was using the track to serve

other industries which had contributed nothing either towards the elevation or maintenance of the track during the preceding twenty years.

Appellant acquired the railroad system which it now operates on July 18, 1931 (R. 29). Thereafter it threatened to abandon service over the track, and because thereof Moulding-Brownell Corporation and E. Heldmaier, two of the industries served by the track, filed a complaint with the Illinois Commerce Commission praying for an order requiring appellant to continue service over the track. (R. 36-38.) After hearings upon that complaint but before any order had been entered by the Commission thereon, appellant filed a petition with the Illinois Commerce Commission praying that an order be entered by the Commission determining that the industries located on and served by the track should pay all future costs of maintaining the track and all license and other fees assessed under ordinance or otherwise because of the occupancy of public streets and alleys, and that in default of such payments by said industries, appellant be authorized to discontinue the rendering of service to said industries over the track. (R. 52-55.)

Ever since the track in question was constructed, both before and after elevation of a portion thereof, it has been connected with the main track of the railroad now owned by appellant, and during all of that period appellant and its predecessors have furnished railroad transportation service over the track to industries adjacent to the track and in the vicinity thereof, (R. 25), and have paid all cost of maintenance except the charge exacted by the City of Chicago as compensation for crossing public streets during the period from 1903 to 1923, and $900 thereafter. (R. 29.)

None of the industries now served over the track in

question receives direct service from the track itself, but such direct service is furnished by means of industrial tracks, paid for and maintained by the respective industries, which branch off from or are an extension of the track in question, and those industries have no other means of railroad transportation available. (R. 30.)

The length of the track in question is 2831 feet—more than one-half of a mile. (R. 31.)

The Commission found that the track in question is a public track and part of the railroad facilities of appellant, (R. 32), and that public convenience and necessity requires that appellant continue the maintenance and operation of the track. (R. 33.)

The Order of the Illinois Commerce Commission.

In its order, the Illinois Commerce Commission stated that the track in question crosses several streets and alleys and, is, and has been for more than thirty years, connected with the main track of the railroad now owned by appellant, and that it is therefore a part of the railroad now owned by appellant and is a public highway open to public use; that its use is not limited to the industries which are now served by the industrial spur tracks which branch off therefrom, but any member of the public who can be served thereby is entitled to such service; and that it would therefore seem most inequitable and unjust to require the industries served by the industrial spur tracks to pay the cost of maintaining and keeping in repair the track in question or to pay any license fees exacted by the City of Chicago on account of the track in question crossing public streets and highways. (R. 17.) The order entered by the Commission denied authority to abandon the spur track in question and denied authority to discontinue the rendering of rail-

road transportation by means thereof, and specifically ordered appellant to continue the maintenance and operation of the track and the rendering of railroad transportation service by means thereof to the industries now served thereby and to such other industries and to all of the public who may now or hereafter be reasonably entitled to such transportation service over the track. (R. 33-34.) As hereinafter shown, for the purposes of this appeal the effect of that order is the same as though the provisions thereof were contained in a statute of the State of Illinois.

The Decision of the Supreme Court of Illinois.

In brief, the decision of the Supreme Court of Illinois, sustaining the validity of the order of the Illinois Commerce Commission, (368 Ill. 584, R. 129-132) is to the effect (1) that, under the law of Illinois, a switch-track built for industrial purposes and across public thoroughfares becomes a part of the main line of the railroad system which it joins and is subject to governmental regulation in the public interest even though it was built by private funds and for the most part on private property; (2) that appellant's argument that the duty of maintenance is an incident of ownership and that since it was under no duty to build the track in the first place and does not now own it, the burden of maintenance cannot be imposed upon it, is incompatible with the repeated holdings of the Supreme Court of Illinois that switch-tracks of this type, once built, become a part of the main line of the railroad, whether built upon private rights-of-way or upon public streets; (3) that such argument overlooks the fact that appellant uses this track for its own benefit to serve the industries located thereon, and, under Illinois law, may use the track, or extensions

thereto, conveniently to serve other shippers and the public at large, and that the public has an interest in the proper maintenance of the track quite apart from the interest of the parties to this suit; (4) that Section 50 of the Public Utilities Act of Illinois authorizes the Illinois Commerce Commission, by order, to direct any public utility to make such additions, extensions, repairs, improvements or changes that the Commission shall find ought reasonably to be made to promote the security or convenience of the public or to secure adequate service or facilities, and that this section is broad enough to impose a duty upon a railroad to maintain property which it uses for its own profit as well as that to which it has title (Appendix, p. 32); (5) that under the facts shown, the order of the Commission will result in no discrimination; and (6) that the order of the Commission was within its statutory power and does not violate any provision of the State or Federal Constitutions. (R. 129-132.)

SUMMARY OF ARGUMENT.

I.

The only federal question presented by appellant, whether a railroad which is required by a statute of a state (here an order of the Illinois Commerce Commission) to operate and maintain a public switch track which is part of that Company's railroad system and operated as such for more than 50 years is thereby deprived of its property without due process of law, is not substantial enough to warrant review by this Court. It also appears that the appellant did not argue this question in its brief before the Supreme Court of Illinois other than to assign it as error. Furthermore, its brief filed with this Court is primarily devoted to contentions that questions of state law were erroneously decided by the Supreme Court of Illinois.

II.

The track in question is property devoted to public use. The Supreme Court of Illinois has held that a switch track, built for industrial purposes and across public thoroughfares by private funds, becomes a part of the main line of the railroad system adjoining and is subject to governmental regulation in the public interest. Such a track is not a private one, but a public highway under Article II, Section 12 of the Constitution of Il nois, providing that railways in Illinois are public highways.

The construction of a state statute and a state constitution adopted by the highest court of the state is not open to review here. This Court has held that under the laws of Illinois a side track open to public use is impressed with a public character and is therefore subject to public control. In the *Union Lime* case, 233 U. S. 211, a statute requiring railroads to construct and maintain a spur track was sustained and a decision of the Wisconsin Commission requiring the extension of a side track was upheld against a contention that the spur was private in character. This Court also held that the railroad was under a duty to maintain it. The track in that case, as here, was constructed at the expense of the shipper.

III.

Under the laws of Illinois the appellant is obligated to maintain, keep in repair and operate the track in question.

This Court must accept as final the decision of the Supreme Court that the order of the Illinois Commerce Commission is authorized by the laws of Illinois. It can consider only the question of whether the order, authorized by Illinois law, is so arbitrary and unreasonable as to deprive appellant of its property without due process of law.

IV.

A railroad, obligated by a state statute or a Commission order to operate and maintain a switch track, is not thereby deprived of its property without due process of law, for the obligation of a utility to render service and maintain adequate facilities is well recognized. It cannot refuse to render service to the public because it has

repudiated a contract purporting to define its liability with respect to the maintenance of this track.

Even if the appellant had shown that the expense of maintaining the property constitutes an excessive burden, it could not discontinue operations without the consent of the Commission. This Court has held that losses and large expenditures in connection with individual operations do not by themselves justify discontinuance of switching or side track operations.

The evidence shows that appellant has received approximately $40,000 in gross revenue in 1934 from the operations which it sought to discontinue. Never was it contended that public convenience does not require continuation of operations on this track or that future operations would result in any loss. There is no suggestion that the required maintenance would result in excessive or arbitrary expenditures.

The decision of the Commission has not been shown to be arbitrary or unreasonable. The construction of the track and its subsequent elevation resulted in no cost to the appellant and its predecessors have never paid any rental for the track. The only expense borne by the appellant and its predecessors has been the cost of maintenance and repair, an obligation which it may reasonably be required to assume.

Appellant receives the benefit from the operations of the facilities in question and it cannot claim that its property is being taken without due process because of the minor expense to which it is put by the Commission's order requiring that it maintain and repair the track.

ARGUMENT.

I.

Appellees' motion to dismiss appeal or affirm the judgment of the Supreme Court of Illinois.

The jurisdiction of this Court was invoked by appellant under that provision of Section 237 of the Judicial Code (28 U. S. C. A. Sec. 344), which provides for a review by this Court of a final judgment in the highest court of a state where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

The statute, the validity of which is attacked by appellant in this case, is necessarily the order of the Illinois Commerce Commission which the Supreme Court of Illinois has held valid, as that order must be treated as though an Act of the legislature of the State of Illinois. *Lake Erie and Western Railroad Co.* v. *State Public Utilities Commission*, 249, U. S. 422, 424.

On July 14, 1938, appellees filed with the clerk of the Illinois Supreme Court their motion to dismiss this appeal or to affirm the decision of the Supreme Court of Illinois, on the ground that there is no substantial federal question in this case, which motion was, by order of this Court, reserved until the hearing on the merits.

The brief and argument since filed by appellant shows that the motion to dismiss or to affirm should be sustained. It now clearly appears from appellant's own brief that the alleged federal question which appellant

claimed it desired to submit to this Court is so unsubstantial and frivolous that it does not warrant consideration by this Court.

Briefly stated, the only federal question presented by appellant is, whether a railroad company which is required by a statute of a state to operate, maintain and keep in repair a public switch-track, which is part of that company's railroad system and which has been operated as a part of such system for more than fifty years, is deprived of its property without due process of law by reason of such requirement to operate, maintain and keep such track in repair. The mere statement of the question should furnish the answer without any argument being necessary.

On page 23 of its brief appellant cites *Milheim* v. *Moffat Tunnel District*, 262 U. S. 710, 716, 717, in support of the statement that if the federal question is one which requires analysis and exposition for its decision, it cannot be said to be frivolous. When the instant case was presented by appellant to the Supreme Court of Illinois, appellant apparently considered any constitutional question in the case as so remote or devoid of merit that it neither made any analysis or exposition of any such question by argument nor cited any authorities in its brief bearing upon the question. Appellant has caused a certified copy of the brief filed by it in the Supreme Court of Illinois to be filed with the Clerk of this Court, and that brief shows that the only reference therein made by appellant to any constitutional question was the mere assertion, in the nature of an assignment of error, that the order of the Illinois Commerce Commission constituted a taking of appellant's property without due process of law, in violation of its rights under the State constitution and under the Fourteenth Amendment to the Constitution of the United

States (p. 17), followed later by the bare statement that the order of the Commission violates appellant's constitutional rights in that it imposes upon appellant the burdens of ownership while recognizing that there is no basis in fact for such imposition (p. 50).

The same, in effect, is true of the brief filed by appellant in this Court. If the authorities cited by appellant, and the arguments made, in support of its contention that questions of state law were decided erroneously by the Supreme Court of Illinois are eliminated, nothing remains in appellant's brief having any application to this case except the mere assertion that the order of the Illinois Commerce Commission deprives appellant of its property without due process of law, because it requires appellant to expend money in maintaining and keeping in repair a track it did not originally construct and which is located on land not owned by appellant. Such assertion wholly ignores the controlling facts that under the settled law of Illinois the track is a public track, dedicated to public use, and is and has been for more than fifty years a part of the railroad system now operated by appellant; also, that the maintenance and repair of the track, including the replacement of ties, rails and other track facilities are rendered necessary by the exclusive use of the track by appellant and its predecessors in furnishing railroad transportation service to its patrons as members of the public.

II.

The track in question is a part of appellant's railroad system and is open for the use of the public.

In its decision in this case, the Supreme Court of Illinois repeated what it had theretofore, in substance, said in several cases, that a switch-track built for industrial

purposes and across public thoroughfares becomes a part of the main line of the railroad system which it joins and is subject to governmental regulation in the public interest even though it was built by private funds and for the most part on private property. (R. 131.) It further said that, under the law of Illinois, appellant may use the track in question, or extensions thereto, conveniently to serve other shippers, in addition to the industries located thereon, and the public at large. (R. 131.)

Whether switch-tracks or spur-tracks are of a public or private nature necessarily depends upon the laws of the state in which such tracks are located, as construed by the court of last resort of the state.

Section 12 of Article XI of the Constitution of Illinois (Appendix, p. 31) provides that railways in Illinois are public highways and shall be free to all persons for the transportation of their persons and property thereon under such regulations as may be prescribed by law. By reason of that constitutional provision, the Supreme Court of Illinois has consistently held that a switch-track, side track or spur track constructed on or across public streets or highways and connected with the main line of a railroad becomes a part of such railroad, whether constructed by the railroad company or by the owner of an industry served by such track or at the joint expense of the railroad company and such owner, and is a public highway within the meaning of the constitutional provision. *Truesdale* v. *Peoria Grape Sugar Co.*, 101 Ill. 561, 567; *Chicago Dock and Canal Company* v. *Garrity*, 115 Ill. 155, 167; *People* v. *Blocki*, 203 Ill. 363, 369; *Public Utilities Commission* v. *Smith*, 298 Ill. 151, 157; *Van Oven* v. *Chicago, Burlington and Quincy Railroad Co.*, 317 Ill. 334, 342-344.

It is, therefore, futile for appellant to argue in this court (Appellant's Brief, pp. 40-43), that the track in question which answers every requirement of the rule established by the decisions of the Supreme Court of Illinois under Section 12 of Article XI of the Constitution of Illinois defining a public switch-track, is not a public track but is a private track.

In *Swiss Oil Corporation* v. *Shanks*, 273 U. S. 407, 411-412, this Court said that the construction of a state court upon the statutes and constitution of its own state cannot be reviewed by this Court.

In numerous cases this Court has held that it is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state. *Quong Ham Wah Co.* v. *Industrial Commission*, 255 U. S. 445, 448; *Price* v. *Illinois*, 238 U. S. 446, 451; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61.

In *Enterprise Irrig. Dist.* v. *Canal Co.*, 243 U. S. 157, 166, this Court said that the decision of the state courts upon questions of state law are controlling and not open to review.

Directly in point is the case of *Lake Erie & Western Railroad Company* v. *State Public Utilities Commission of Illinois*, 249 U. S. 422, 424, where, in considering the nature of a side track in Illinois, this Court said that under the laws of Illinois the side track, although used principally in moving freight from and to one industry, was open to use by the public and subject to public control like other parts of the company's road; that, in other words, it was a track which the state impressed with a public character.

A complete answer to appellant's whole argument in this case has been furnished by this Court in *Union*

Lime Company v. *Chicago and Northwestern Railway Company*, 233 U. S. 211. In that case the validity of a statute of Wisconsin was involved, which required every railroad to acquire the necessary right-of-way and to construct, connect, maintain and operate a reasonably adequate and suitable spur track not exceeding three miles in length whenever practically indispensable to the successful operation of any industry or enterprise and not unusually unsafe or unreasonably harmful. The railroad had the right, under the statute, to require the person primarily to be served thereby to pay the legitimate cost of acquiring, by condemnation or purchase, the necessary right-of-way for the spur and of its construction, as determined by the Railroad Commission. The statute authorized the Commission to receive complaints, in case of the failure or refusal of railroads to perform the prescribed duty, and to make appropriate orders. Acting upon that statute, the Commission directed the railway company to extend a spur to a certain industry. The same argument was made in that case as is made by appellant in this case—that the spur was not for public use. This Court said that the statute must be read in the light of the construction placed upon it by the Supreme Court of Wisconsin, which held the use to be a public one (p. 221) and quoted the following from the decision of that court (p. 220-221):

> "'Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served with provisions for subsequent equitable division of such cost, does not make it a private track nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited

> number of owners, affects the extent and not the nature of its use—the track is none the less a part of the avenue through which the commodities reach the public. Subject to the equitable division of the initial cost, the track is at the service of the public as much as any other, and it constitutes an integral part of the railroad system. *The duty to maintain and operate it rests upon the railroad.* (Italics ours.) Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with any one else who may desire to use it.'"

On pages 45-46 of its brief appellant refers to that case, in connection with others, and says that in all those cases the track was owned or to be owned by the railroad, and was located or to be located on railroad right-of-way. That statement is no more true of the spur track involved in the *Union Lime Company* case than it is true in this case. There the owner of the industry primarily to be served was required to pay the entire cost and expense of acquiring the right-of-way and of constructing the spur track. (Note 1, pp. 217-218.) In what way the railroad thereby became the owner of the right-of-way and track, the entire cost of which had been paid by the owner of the industry, is not explained by appellant. Apparently the spur track involved in that case was in exactly the same condition as to ownership as the spur track in this case; it was constructed by or at the expense of a certain industry and was dedicated for public use, and as stated in the *Union Lime Company* case, "the duty to maintain and operate it rests upon the railroad."

III.

Under the laws of Illinois, appellant is obligated to maintain, keep in repair and operate the track in question.

Appellant's argument is replete with assertions that there is no statute or law in Illinois which requires it to maintain and keep in repair the track in question (Appellant's Brief, pp. 28-32; 34; 37-38). Those assertions are too numerous and lengthy to quote in full, but the following are fairly representative.

On page 28 of its brief appellant says that there is no provision of any Illinois statute relating to the maintenance of switch-track constructed by a shipper off a railroad's right-of-way and owned by that shipper; that there is no statutory authority for the requirement of the Commission that appellant maintain the track here involved; and that there has never been a common law obligation upon a railroad company to *construct* such a track. Those statements are followed by quotations from cases purporting to show what the common law is with reference to the obligation of a railroad company to *construct* a track, (Appellant's Brief, pp. 28-29), notwithstanding the fact that there is no question of any obligation on the part of appellant to construct a track involved in this case. Then follows a reference to the Illinois statutes and to a provision of the Constitution of Illinois relating to railroad companies receiving and transporting grain in bulk, which cannot have any application to this case because there are no elevators or public warehouses served by means of the track in question.

On page 30 of its brief, appellant quotes a section of the Illinois statutes and tells this Court what construction appellant places on that statute.

On page 32 of its brief, appellant says that the only inference to be drawn from the common law and the constitutional and statutory provisions relating to such track is that the owner or the industries served thereby must maintain the track in such condition that service can be given; and that the Supreme Court of Illinois was wrong when, in its decision in this case, it held otherwise.

On page 34 of its brief, with reference to Section 50 of the Illinois Public Utilities Act (Ill. Rev. Stat. 1937, ch. 111-2/3, sec. 50), appellant says that the Supreme Court of Illinois misconstrued and misapplied that statute in its decision in this case.

Appellant also contends, and attempts to support its contention with several pages of argument and citation of authorities (Appellant's Brief, pp. 34-39), that it cannot be required to maintain the track in question because that is not within its original undertaking to serve the public. A sufficient answer to that contention should be, that it comes with poor grace from appellant, after more than fifty years exclusive use of this track by it and its predecessors as a part of the railroad system now owned by appellant, to say at this late day that the operation and maintenance of the track by appellant is not within the railroad's original undertaking to serve the public.

Manifestly this Court is not concerned with any such questions upon this appeal.

In *American Railway Express* v. *Kentucky*, 273 U. S. 269, 272-273, this Court said that the due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this Court to revise the decisions of the state courts upon questions of state law.

In *Detroit & Mackinac Railway* v. *Paper Co.*, 248 U. S.

30, this Court said that it cannot consider questions of local law; that upon the construction of the state laws the state court has the last word.

In *Arkansas Southern Railroad* v. *German Bank*, 207 U. S. 270, 275, this Court said that if the state Supreme Court rested its judgment upon principles of common law as it understood them, this Court has no jurisdiction even though it believes the State Court was wrong.

In *Waters-Pierce Oil Co.* v. *Texas* (No. 1) 212 U. S. 86, 97, this Court said that its jurisdiction to review the proceedings of the state courts is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court.

If this court considers this case as presenting any substantial Federal question, it must accept the decision of the Supreme Court as final that the order of the Illinois Commerce Commission is authorized by the laws of Illinois, and consider only the question whether that order deprives appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The obligation of appellant to comply with that order, in so far as the laws of Illinois are concerned, has been settled by the Supreme Court of Illinois.

IV.

The order of the Commission does not violate the Fourteenth Amendment to the Constitution of the United States.

When the smoke screen raised by appellant to confuse the issue before this Court has been brushed aside, the simple question remains, whether a railroad company which is required by a statute of a state (an order of the Illinois Commerce Commission) to operate, maintain and keep in repair a public switch track, which is a part of that company's railroad system and which has been operated as a part of such system for more than fifty years, is deprived of its property without due process of law by reason of such requirement to operate, maintain and keep such track in repair.

Obviously the Illinois Commerce Commission has the right, without violating the Federal Constitution, to require appellant to continue the operation of the track in question. It necessarily follows that appellant must maintain it in such condition that it can be operated safely. It owes that duty to the public. If, under state law or under contract, as between appellant and any private party or parties, the obligation to maintain and keep in repair that track is imposed upon such private party or parties, appellant can obtain reimbursement for its expenditures by suit in the state courts. It cannot however, refuse to perform its duties to the public, by any contention that, as between it and a certain private party or parties, the cost and expense of performing such duties is, under state law or under contract, imposed on the private party or parties. The question before this Court is, therefore, further narrowed to a determination of the question whether, as between appellant

and the public, the requirement that appellant continue the operation of the track deprives appellant of its property without due process of law.

In this connection it may be of interest to the Court that Section 49a of the Public Utilities Act of Illinois (Ill. Rev. Stat. 1937, ch. 111 2/3, Sec. 49a) provides that "no public utility shall abandon or discontinue any service without first having secured the approval of the Commission". (Appendix, p. 31.) Obviously, it was on account of that provision that appellant deemed it necessary to apply to the Commission for permission to abandon service over the track in question, and injected into the case the question whether it or the industries now primarily served over the track should pay the cost of maintenance and repair. But, as we have said, that is a question of state law and is a question for the state courts.

Fort Smith Light and Traction Company v. *Bourland*, 267 U. S. 330, involved the right of the Traction Company to abandon a part of a street railway line without leave of the City Commission, when under the state law it was not permitted to abandon any part of its line without leave of the City Commission. The Traction Company, in applying to the City Commission for such leave, claimed that the part sought to be abandoned was unremunerative. It appeared that on account of a change of grade in the street, the Traction Company would be required to expend $11,000 in relaying tracks in order to continue the operation of that part of the line which it sought to abandon, while the daily earnings allocated to that part of the system were only $2.40, and the cost of operating it was $8.25 per day. The request to abandon was denied by the City Commission. Suit was brought in the state court to set aside the order of the

City Commission on the ground that it deprived the Traction Company of its property without due process of law. The highest court of the state denied relief, and this Court said (p. 332):

> "The Greenwood Avenue line had been in operation nearly twenty years. No change in conditions had supervened which required the commission to permit the abandonment, unless it were the fact that this particular part of the system was being operated at a loss; that continued operation would involve practical rebuilding of that part of the line; that such rebuilding would entail a large expenditure; and that the system as a whole was not earning a fair return upon the value of the property used and useful in the business. The order complained of does not deal with rates. Nor does it involve the question of the reasonableness of service over a particular line. * * * It merely requires continued operation. We cannot say that it is inherently arbitrary. A public utility cannot, because of loss, escape obligations voluntarily assumed. *Milwaukee Electric Ry. Co.* v. *Milwaukee*, 252 U. S. 100, 105. The fact that the company must make a large expenditure in relaying its tracks does not render the order void. Nor does the expected deficit from operation affect its validity. A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss."

In *Western & Atlantic Railroad* v. *Georgia Public Service Commission*, 267 U. S. 493, the railroad company sought to enjoin the enforcement of an order of the Georgia Public Service Commission requiring the railroad to furnish switching service on an industrial siding to an industry. The railroad company had notified the industry that unless it signed the railroad company's standard form of sidetrack agreement, service over the track would be discontinued. In its bill, the railroad company alleged that the track was out of repair, that it

would have to expend $440 to put the track in proper repair, and that enforcement of the order would deprive the railroad company of its property without due process of law. This Court said (pp. 496-497):

> "It is said that the requirement of the continuance of the service deprived the Company of its property without due process of law, in violation of the Fourteenth Amendment, because the service rendered by the sidetrack was much greater in out-of-pocket cost than the compensation. This can not be sustained. The service has been rendered for years. It was a voluntary arrangement, and under its statutory powers (Sec. 2664, Georgia Code, 1910) was made irrevocable by the Public Service Commission under Rule 14, except by consent of the Commission. The spur track was for a public purpose. *Union Lime Co.* v. *C. & N. W. Ry. Co.*, 233 U. S. 211. The requirement that such a service should not be discontinued without notice and hearing was clearly within the police power of the State. • • • Even if the cost of the switching is more than what is received for it, we can not determine on any showing made by the Company that the switching does not work a benefit in the increased business that the Company gets, or may get, by reason of the added facilities furnished by the switching. The switch is a small part of the whole railway, and the mere fact that the switching may not be profitable by itself can not be held to be a confiscation of property, even if it involves a loss."

In *Atlantic Coast Line Railroad Company* v. *North Carolina Corporation Commission*, 206 U. S. 1, this Court said (pp. 19-20):

> "The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not

and could not be successfully questioned in view of the long line of authorities sustaining that doctrine. Accepting this general rule, the assignments of error rest upon the hypothesis that the order which the court below enforced was so arbitrary and unreasonable in its character as to transcend the limits of regulation and to be in effect a denial of due process of law or a deprivation of the equal protection of the laws."

In the case now before this Court, appellant concedes, (Appellant's Brief, p. 56), and the evidence shows, that in 1934 appellant received approximately $40,000 in gross revenue from traffic moving over the track in question, but says that fact is unimportant. It necessarily makes that statement because it has never contended that the track has ever been operated at a loss, but its sole contention is that no matter how profitable the operation of the track may be to appellant, it cannot be required to maintain the track and keep it in repair because it does not own the track. In other words, appellant's position is, and has always been, that it is entitled to all the benefits from the track but does not want to be burdened with any of the costs attendant upon the maintenance of the track. Such a position is most inequitable and unjust, as found by the Commission. (R. 17.)

In its final analysis the question before this Court, therefore, is whether the order of the Commission is so arbitrary and unreasonable in its character as to transcend the limits of regulation and to be in effect a denial of due process of law.

That a state can compel a railroad company to continue the operation of a track when public convenience and necessity requires such operation, has been settled by the decisions of this Court as hereinbefore shown. In this case the evidence shows and the Commission

found that public convenience and necessity requires the operation of the track in question, as there are three industries (one being a public utility furnishing gas to the City of Chicago and its inhabitants) which have no other means of railroad transportation service. As to this the Commission said (R. 15-16):

> "The Alton does not contend that public convenience and necessity no longer require the operation of the track, nor does it contend that the operation over the track has resulted or will result in any loss to it. On the contrary, the evidence shows that the track is indispensable to the operation of the plants of the Gas Company and the plants of the Moulding-Brownell Corporation and E. Heldmaier, Inc., and that the traffic handled over the track in 1934 by the Alton amounted to about $40,000 according to the testimony of the Alton's own witness."

Thus it appears that there is no question of excessive expenditures involved in this case.

That the order of the Commission is not arbitrary or unreasonable in requiring appellant to continue the maintenance and operation of the track appears from what we have hereinabove said and is shown by the evidence offered by appellant itself before the Commission. The order can, furthermore, be tested by all the criteria set forth in the case of *Chicago & N. W. Ry. Co.* v. *Ochs*, 249 U. S. 416, and not be found wanting. In that case this court said (p. 421):

> "Of course, the expense is an important element to be considered in determining whether the requirement is within the bounds of reasonable regulation or is essentially arbitrary, but it is not the only one. The nature and volume of the business to be affected, the revenue to be derived from it, the character of the facility required, the need for it and the advantage to be realized by shippers and the public are also to be considered. Tested by these criteria

we think the order in question is not arbitrary, but reasonable."

The track in the instant case is one over which appellant and its predecessors have served several industries for more than fifty years and over which appellant is, by the laws of Illinois, required to serve any member of the public requiring service by means thereof. It cost appellant and its predecessors nothing for construction, and nothing for track elevation required by a city ordinance. Appellant and its predecessors have paid no rental for the track. For more than twenty years appellant's predecessors were reimbursed by the Gas Company for the amounts which they were required by ordinance to pay as compensation to the City of Chicago for crossing public streets and alleys. That expense, as well as the entire cost of elevation, was borne by the Gas Company under a contract made in 1904, which was before the existence of any Commission in Illinois authorized by law to compel appellant's predecessors to furnish railroad transportation service over the track. The only expense borne by appellant and its predecessors for the track, of which they have had the exclusive use ever since it was constructed, has been the cost of maintenance and repair occasioned by their use of the track, and the license fee required by the 1924 ordinance. The replacement of ties, rails and other track facilities, of which appellant complains because it cannot charge the cost thereof to its capital account, is rendered necessary by appellant's free use of a track which it says does not belong to it. At some time in the past those ties and rails were new and were paid for by some one other than appellant or its predecessors. Is it inequitable or unjust to require appellant to replace such ties and rails in a track, which it says belongs to the Gas Company, which it has worn out in serving the public?

On page 37 of its brief, appellant says that the duty of maintaining railroad track is one which normally results from ownership of such track. On page 38 it says that expenditures made by it upon the track will continue to be made for the benefit of the owner thereof and the other industries served thereby, and that such a conclusion is contrary to every idea of justice and equity.

Apparently appellant has a most distorted conception of equity and justice. In its petition to the Illinois Commerce Commission it prayed for an order determining that the industries located on and served by the track should pay all future costs of maintenance. It based its petition on the ground that as it does not own the track it cannot be required to maintain it. It evolved the theory, which is contrary to the common law (*Gridley* v. *City of Bloomington*, 68 Ill. 47, 51; *Sunasack* v. *Morey*, 196 Ill. 569, 571; 51 C. J. 760; *Williamson* v. *Phillipoff*, 66 Fla. 549, 60 So. 269, 271; *German-American Bank of Seattle* v. *Normile*, 82 Wash. 368, 144 Pac. 289, 290), that the obligation to maintain and repair a track is irrevocably imposed by law upon the owner and cannot be imposed by law upon another without violating the Fourteenth Amendment to the Constitution of the United States. Realizing that on such theory an industry or industries which did not own the track likewise could not constitutionally be required by law to pay any of the cost of maintenance and repair, although entitled by law to receive railroad transportation service over the track because it is a public highway, appellant was forced to take the position that as the Gas Company is the owner of the track, it is because of such ownership, required and on appellant's theory is the only one who can be constitutionally required, by law to pay the cost of main-

tenance and repair. Appellant's statement that the Gas Company is the owner of the track in question is based upon the testimony of John T. Craven, Chief Operating Engineer of the Gas Company who testified that the Gas Company owns the track, on the theory that the Gas Company paid for the construction of the track (R. 87), evidently meaning that the Gas Company paid the cost of elevation of the track. However, for the purposes of this argument, it may be assumed that the Gas Company does own the track, based upon the fact that it paid all the cost of the construction thereof and paid all of the license fees imposed by the City of Chicago on account of the track crossing public streets and alleys during the period from 1903 to 1923.

The Gas Company is also a public utility and manufactures and supplies gas to the City of Chicago and its inhabitants. It paid a large part, if not all, of the cost of elevating the track in 1904. It receives no rental or other compensation from appellant for the use of the track, but on the contrary pays appellant the same rates for railroad transportation service as are paid by other industries for such services over the track. Yet, appellant's conception of equity and justice is, that the Gas Company—not appellant—should pay the cost of maintaining and repairing this public track in order that the public may continue to receive the railroad transportation service to which it is entitled over this track.

It is therefore apparent that the order of the Illinois Commerce Commission is neither arbitrary nor unreasonable, but is in accordance with accepted principles of law, and that an order imposing upon one industry, or upon all of the industries now served by appellant over the track in question, the obligation to maintain the track would be improper, inequitable and unjust.

CONCLUSION.

This Court should dismiss the appeal due to the absence of a substantial federal question or in the alternative affirm the order of the Supreme Court of Illinois sustaining the order of the Commission denying the railroad permission to discontinue service over the side track. The Commission's order constitutes a reasonable exercise of the police power of the State of Illinois. Requiring the railroad to maintain a switch track devoted to public service does not result in taking its property without due process of law.

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APPENDIX.

Section 12 of Article 11 of the Constitution of the State of Illinois.

§ 12. Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the general assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state.

Section 49a of Chapter 111 2/3, Illinois Revised Statutes, 1937.

§ 49a. No public utility shall abandon or discontinue any service without first having secured the approval of the Commission. In granting its approval, the Commission may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest. Provided, however, that any public utility abandoning or discontinuing service in pursuance of authority granted by the Commission shall be deemed to have waived any and all objections to the terms, conditions or requirements imposed by the Commission in that regard. Provided further, that nothing in this section shall be construed to limit the right of a public utility to discontinue service to individual patrons in accordance with the effective rules, regulations, and practices of such public utility.

Section 50 of Chapter 111 2/3, Illinois Revised Statutes, 1937.

§50. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any two or more public utilities ought reasonably to be made or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected in the manner and within the time specified in said order. If any additions, extensions, repairs, improvements or changes, or any new structure or structures which the Commission has ordered to be erected, require joint action by two or more public utilities, the Commission shall notify the said public utilities that such additions, extensions, repairs, improvements or changes or new structure or structures have been ordered and that the same shall be made at the joint cost whereupon the said public utilities shall have such reasonable time as the Commission may grant within which to agree upon the apportionment or division of cost of such additions, extensions, repairs, improvements or changes or new structure or structures, which each shall bear. If at the expiration of such time such public utilities shall fail to file with the Commission a statement that an agreement has been made for a division or apportionment of the cost or expense of such additions, extensions, repairs, improvements or changes, or new structure or structures, the Com-

mission shall have authority, after further hearing, to make an order fixing the proportion of such cost or expense to be borne by each public utility and the manner in which the same shall be paid or secured.

Section 69 of Chapter 111 2/3, Illinois Revised Statutes, 1937.

§69. At the time fixed for any hearing upon a complaint, the complainant and the person or corporation complained of, and such persons or corporations as the Commission may allow to intervene, shall be entitled to be heard and to introduce evidence. The Commission shall issue process to enforce the attendance of all necessary witnesses. At the conclusion of such hearing the Commission shall make and render findings concerning the subject-matter and facts inquired into and enter its order based thereon. * * *

SUPREME COURT OF THE UNITED STATES.

No. 231.—October Term, 1938.

The Alton Railroad Company, Appellant, vs. Illinois Commerce Commission, Moulding-Brownell Corporation, and E. Heldmaier, Inc., et al.	Appeal from the Supreme Court of the State of Illinois.

[January 16, 1939.]

Mr. Justice Butler delivered the opinion of the Court.

The question is whether an order made by the commission, denying appellant's application for authority to discontinue, and requiring it to continue, maintenance and operation of a switch track in Chicago used to serve shippers, deprives it of its property in violation of the due process clause of the Fourteenth Amendment. Specifically, appellant maintains that by compelling it to expend its funds for the upkeep of a track not constructed or owned by it and upon land it does not own, the order is repugnant to that provision of the Constitution. The Illinois supreme court, affirming the circuit court of Cook County, sustained the order as a valid exercise of state power. 368 Ill. 584.

Appellees, insisting that our decisions rule that question in their favor, filed a motion to dismiss or affirm.* We postponed consideration of the motion to the argument of the case on the merits. Now after hearing counsel it appears that the question presented by the appeal is not so clearly lacking in merit that upon mere citation of our decisions it may be put aside as not requiring further consideration. We therefore deny the motion. *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 716, 717. *Hamilton* v. *Regents*, 293 U. S. 245, 258.

Through purchasers at judicial sale July 18, 1931, appellant acquired the properties of the Chicago & Alton Railroad Company, a

*Appellees rest their motion to dismiss or affirm on: Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211. Lake Erie & W. R. R. Co. v. Pub. Util. Comm., 249 U. S. 422. Chicago & N. W. Ry. Co. v. Ochs, 249 U. S. 416. Western & Atlantic v. Public Comm., 267 U. S. 493, 496.

consolidated company formed in 1906 and in receivership from 1922 to the sale. It and its predecessors, including the receiver, may for brevity be referred to as the carrier.

The switch track in question extends from the carrier's main line about 150 feet on the right-of-way, thence 2,681 feet, crossing public streets and alleys, to the boundary of the plant of the Peoples Gas Light & Coke Company upon land largely, if not wholly, owned by that company and the other industries served by the track. The industries, commencing with the one nearest the main line, are Commonwealth Edison Company, E. Heldmaier, Inc., Moulding-Brownell Corp., and the gas company. All but the first depend upon the track for rail transportation. It has been extended for some distance into the plant of the gas company. Five spurs, that appropriately may be called private sidings, extend from it and serve within the plants of the industries. There is here no question as to the part of the track within the gas plant or of the spurs serving the industries. Construction was begun prior to 1884, and at least since 1887 the stretch here in question has been used to serve the gas company, and for more than 30 years other industries between that company's plant and the main line. The original cost of construction was borne by the gas company and possibly other industries. It does not appear by whom the cost of maintenance prior to 1904 was paid.

Pursuant to ordinance passed November 2, 1903, a part of the track was elevated at crossings of three streets and two intervening alleys. November 1, 1904, the carrier made an agreement with the gas company and the predecessor of the electric company pursuant to which they paid the cost of elevation. The gas company agreed to pay an annual fee of $300 imposed by the ordinance for the privilege of maintaining the track across the streets and alleys. The carrier agreed to maintain the track. And, by an assignment reciting that the ordinance had been obtained for their benefit, the carrier transferred it to the gas and electric companies. The gas company paid the fees until the 1903 ordinance expired November 2, 1923. Then it and the electric company insisted that future exactions by the city as well as maintenance should be borne by the carrier. The latter refused to accept the additional burden. December 10, 1924, the city passed an ordinance authorizing use of the streets for 20 years from expiration of the 1903 ordinance, increased the annual fee to $1,400, and required a bond to insure

compliance. The carrier accepted the terms of the ordinance, having an understanding with the gas and electric companies that they would pay the charges. Nevertheless, it paid $1,400 annually from 1923 to 1932 and was reimbursed only to the extent of $300 paid by the gas company for each of three years in that period. As of November 2, 1932 the annual fee was reduced to $700, and appellant paid it up to November 2, 1936. The carrier bore the cost of maintaining the track from 1904 to March 26, 1936. On that date, exercising as it asserts a right reserved by final decree in the receivership proceeding, it elected not to assume the contract. Nevertheless, it has continued to use and maintain the track. Thus since 1903 the carrier, in addition to maintaining the track, has paid $15,190 to the city as compensation for its occupancy of the public streets and alleys. Through error as it says, it paid taxes on the track for some of the time.

Needed repairs and betterments of the track involved will require expenditures amounting to about $4,000 a year for three years; then annual cost of maintenance will be about $1,000. It may be assumed that, in order to continue operation, appellant will have to pay whatever fees are charged by the city, and that, because the track is on land not owned by it, its expenditures for additions and betterments must, as it asserts, by accounting regulations be charged to operating expenses. The annual gross revenue for transportation over the track amounts to about $40,000.

Appellant does not suggest that operating expenses including the city charges, plus cost of replacements and betterments, will exceed revenue derived from use of the track or that operation of the track will not yield it a reasonable profit; nor does it claim, as of constitutional right, to be entitled to have any profit from use of the switch track separately considered. *Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 575, 580. *Fort Smith Traction Co.* v. *Bourland*, 267 U. S. 330, 332. *Western & Atlantic* v. *Public Comm.*, 267 U. S. 493, 496-497. Admittedly, appellant is willing to continue to use the track to serve the industries. Its petition prays an order requiring them to pay cost of maintenance and future city charges. It seeks authority to discontinue service and to cancel applicable rates, but only in case of failure of the industries to pay these operating expenses. It wants, not to give up the traffic, but to shift a substantial financial burden that it has long been bearing to the industries served.

The state supreme court held: As between the public and the railroad, a switch track built for industrial purposes and across public thoroughfares becomes a part of the main line of the system which it joins and is subject to governmental regulation in the public interest, even though it was built by private funds and for the most part on private property; appellant uses the switch track in question for its own benefit to serve industries located on it and may use it and extensions of it to serve other shippers and the public at large; the public has an interest quite apart from that of the parties to the suit in the maintenance of the track; the state public utility act, § 50, is broad enough to impose upon a railroad duty to maintain the property which it uses for its own benefit as well as that to which it has title; the commission has ample power to enforce that duty and the order does not violate any provision of the state or federal constitutions.

We have held: The uses for which a track was desired are not the less public because the motive which dictated it . . . ocation was to reach a private industry, or because the proprietors of that industry contributed to the cost. *Hairston* v. *Danville & Western Railway*, 202 U. S. 598, 608. The State, consistently with the due process clause of the Fourteenth Amendment, may empower a common carrier by railroad to condemn a right-of-way for a spur leading to a single industry to be operated under obligations of public service open to all and devoted to public use. *Union Lime Co.* v. *Chicago & N. W. Ry. Co.*, 233 U. S. 211, 222. It may compel a railroad to extend a siding to an adjacent industry so as to provide additional trackage for public use and, if necessary, to condemn a right-of-way. *Chicago & N. W. Ry. Co.* v. *Ochs*, 249 U. S. 416, 419. For similar exertions of state power, see *Lake Erie & W. R. R. Co.* v. *Pub. Util. Comm.*, 249 U. S. 422, 424 and *Western & Atlantic* v. *Public Com.m., supra.*

The decision of the state supreme court in this case must here be held conclusively to establish that under the constitution and laws of Illinois the order is valid. The decisions of this Court above cited leave no doubt as to the power of the State to require a common carrier by railroad to condemn rights-of-way for and to construct switch tracks like the one here involved. So far as concerns decision of this case, it matters not whether Illinois has exerted that power, for the track has been laid and is being used by the carrier. The required maintenance and operation are not be-

yond the scope of the carrier's undertaking to serve the public. *Union Lime Co.* v. *Chicago & N. W. Ry. Co., supra. Chicago & N. W. Ry. Co.* v. *Ochs, supra.*

Assuming that the questions whether the switch track is open to public use and has become a part of the main line are so related to the constitutional issue here presented that the state court's determination of them is not binding upon this Court, we are of opinion that, upon the facts alleged in appellant's petition to the commission, the latter's unchallenged findings, and our decisions in similar cases, it is clear that in point of fact and law the switch track and any extensions of it that may be made are open to use to serve the public and constitute a part of the carrier's system.

Asserting that the duty to maintain a track such as that in question normally results from ownership, appellant earnestly insists that the order is shown to be unreasonable by the fact that rails and other materials purchased and owned by it when put into the track immediately cease to belong to it and become the property of the gas company which, appellant says, retains right of ownership in the track. But, in making that and similar arguments, appellant ignores the decisions in this case of the commission, the state supreme court, and as well the ruling of this Court just indicated, to the effect that the track in question is one built for industrial purposes on and across public thoroughfares; a track that has become a part of the main line of the carrier's system and, though constructed without cost to it on lands owned by others, is open to public use; a track which has long been and is being used by the carrier for its own benefit and by it may be used, with extensions if any shall be made, to serve the public at large.

Appellant does not suggest that as against the owners of the land or those who paid for building the track, it is a trespasser or without right to continue to maintain and operate the track as required by the order. Nor does it say that, by exertion of the power of eminent domain, it may not successfully resist demands of claimants or owners for possession of any part of the land or of the track not owned by it. See *Mapes* v. *Vandalia R. R. Co.*, 238 Ill. 142, 145; *Black* v. *C., B. & Q. R. R.*, 243 Ill. 534, 539; *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, 11; *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260, 271.

If, as suggested, expenditures for needed betterments, as well as those for maintenance, are chargeable to operating expenses, all are returnable to the carrier, out of operating revenue, as a part of the cost of maintenance and use. And, if appellant acquires title to the land and track, then additions and betterments made by it will constitute a part of its investment in road and equipment owned and used for its purposes as a common carrier and, by the due process clauses of the state and federal constitutions, safeguarded against confiscation.

It is clear that enforcement of the order will not take appellant's property in violation of the due process clause of the Fourteenth Amendment.

Affirmed.

Mr. Justice BLACK is of opinion that the motion to dismiss should be granted.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.